

1 UNITED STATES DISTRICT COURT
2 WESTERN DISTRICT OF WASHINGTON
3 AT TACOMA

4 RICHARD TRAINOR,

5 Plaintiff,

6 v.

7 LARRY PERRY and SOCIAL
8 SECURITY ADMINISTRATOR,

9 Defendants.

CASE NO. C12-5128 BHS

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS

10 This matter comes before the Court on Defendants' Motion to Dismiss. Dkt. 6.
11 The Court has considered the pleadings filed in support of and in opposition to the
12 motion and the remainder of the file and hereby grants the motion for the reasons stated
13 herein.

14 **I. PROCEDURAL HISTORY**

15 On January 5, 2012, the Plaintiff filed a complaint against the Defendants in
16 Peirce County District Court. Dkt. 1-1 at 1. On February 14, the case was removed to this
17 Court. Dkt. 1. On February 15, 2012, the Court sent a Notice of Removal letter to the
18 Plaintiff. Dkt. 2. On March 3, 2012, Defendants filed a Motion to Dismiss Plaintiff's
19 complaint. Dkt. 6. On March 3, 2012, Defendants also filed a motion to stay discovery
20 pending resolution of their motion to dismiss. Dkt. 7. On April 17, 2012, this Court
21 granted the Defendants unopposed motion to stay proceedings pending the resolution of
22 their motion to dismiss. Dkt. 12. On March 20, 2012, Defendants sent Plaintiff

1 notification of the re-noting dates. Dkt. 10. On March 23, 2012, Defendants filed an
2 affidavit showing they had served the Plaintiff. Dkt. 11. Plaintiff failed to respond in
3 opposition to Defendants' motion.

4 **II. FACTUAL BACKGROUND**

5 On January 5, 2012, Plaintiff filed a Complaint in Pierce County District Court
6 Small Claims against the Government, claiming that an employee of the Social Security
7 Administration ("SSA"), Larry Perry, "directly caused me to spend \$3250.00 in out of
8 pocket expenses due to underpayments for my SSA and SSI from 9/2009 – 1/2011. They
9 screwed up and refuse to be held accountable." Dkt. No. 1-2. The Government timely
10 removed the lawsuit to United States District Court on February 14, 2012. *Id.*

11 To the extent Plaintiff's allegations sound in tort, the SSA refers all administrative
12 tort claims to the Office of General Counsel for review and processing. *See* Dkt 6-1 at 2
13 (Ledford Decl. at ¶ 1). Accordingly, if a tort claim had been filed with the SSA, a record
14 of that filing would be maintained in the General Counsel's office. *Id.* (Ledford Decl. at
15 ¶¶ 1-2). A search of the Office's database found no record of an administrative tort claim
16 filed by Plaintiff or an authorized representative, relating to the claims referenced in
17 Plaintiff's Complaint. *Id.* (Ledford Decl. at ¶ 3).

18 **III. DISCUSSION**

19 In this case, the Defendants filed a motion to dismiss which argues, in part, that
20 the Court lacks subject matter jurisdiction over the Plaintiff's claim because the Plaintiff
21 failed to exhaust his administrative remedies under the Federal Tort Claims Act (FTCA).
22 Dkt. 6 at 3. Defendant also filed a declaration testifying the Plaintiff has been service.

1 Dkt. 11. The Plaintiff has failed to respond in opposition to the Defendants' Motion to
2 Dismiss.

3 Rule 7(b)(2) of the Local Rules states that “[i]f a party fails to file papers in
4 opposition to a motion, such failure may be considered by the court as an admission that
5 the motion has merit.” The Plaintiff failed to respond in opposition to Defendants’
6 motion. Therefore, the court will consider Plaintiff’s failure to respond that Defendants’
7 motion has merit.

8 With regard to the merits of the motion, Plaintiff’s allegations involve negligent or
9 wrongful conduct by a government agency or employee. An action against the United
10 States for damages resulting from the negligence or wrongful conduct of a government
11 agency or employee, must be brought under the FTCA, 28 U.S.C. §§ 2671-2680. As a
12 jurisdictional prerequisite, an FTCA action can only be instituted once an administrative
13 claim is denied, either actually or constructively by the agency’s failure to act upon the
14 claim within six months. 28 U.S.C. § 2675(a). Specifically, “[a]n action shall not be
15 instituted upon a claim against the United States for ... injury or loss of property ... caused
16 by the negligent or wrongful act or omission of any employee of the Government while
17 acting within the scope of his office or employment, unless the claimant shall have first
18 presented the claim to the appropriate Federal agency and his claim shall have been
19 finally denied by the agency in writing and sent by certified or registered mail. . . .” *Id.*
20 Thus, an FTCA action may not be maintained when the claimant fails to exhaust
21 administrative remedies prior to filing suit. *McNeil v. United States*, 508 U.S. 206 (1993);
22 *Jerves v. United States*, 966 F.2d 517, 518 (9th Cir. 1992); *Caton v. United States*, 495

1 F.2d 635, 638 (9th Cir. 1974) (statutory procedure is clear that tort proceeding may not be
2 commenced in court against the United States until claim conclusively denied or lapse of
3 six months without action); *Burns v. United States*, 764 F.2d 722, 724 (9th Cir. 1985)
4 (claim requirement is jurisdictional in nature and may not be waived).

5 Here, Defendants filed a motion demonstrating that the Court lacks subject matter
6 jurisdiction. Dkt. 6 at 3-6. With Defendants' motion, they submitted a declaration from
7 Mark S. Ledford, Director of the Fiscal Law Division, Office of the General Counsel,
8 Office of General law, SSA, testifying that the Plaintiff did not present an administrative
9 tort claim to the SSA. Dkt. 6 at 2. Plaintiff has failed to respond, and the court considers
10 that failure an admission that Defendants' motion has merit. Moreover, there is no
11 evidence in the record that Plaintiff has submitted an administrative tort claim to the
12 SSA.

13 Therefore, the Court grants Defendants' motion because Plaintiff failed to exhaust
14 his administrative remedies under the FTCA.

15 IV. ORDER

16 Therefore, it is hereby **ORDERED** that:

17 Defendant's Motion to Dismiss (Dkt . 6) is **GRANTED**. Plaintiff's claims
18 are hereby **DISMISSED WITHOUT PREJUDICE**.

19 Dated this 17th day of May, 2012.

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BENJAMIN H. SETTLE
United States District Judge